IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 16TH AUGUST 2007 / 25TH SRAVANA 1929

Ex.SA.No. 8 of 2007()

AS.115/2001 of WAKF TRIBUNAL, KOZHIKODE AND
ADDITIONAL DISTRICT & SESSIONS JUDGE, KOZHIKODE
E.A.486/1999 in E.P.241/1997 IN
OS.980/1966 of PRL.M.C.KOZHIKODE-I

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: APPELLANTS/APPELLANTS/CLAIM PETITIONERS

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1. MAS TRADERS,
   REPRESENTED BY ITS MANAGING PARTNER,
   P.P. MOOSA,S/O. ABOO HAJI,
   AGED 55 YEARS, RESIDING AT KATCHERI AMSOM AND
   DESOM OF KOZHIKODE TALUK,
   KOZHIKODE DISTRICT.

2. R.M.MYMOONATH, AGED 45 YEARS,
   W/O. P.P.MOOSA, PARTNER, MAS TRADERS,
   RESIDING AT KATCHERI AMSOM AND DESOM OF
   KOZHIKODE TALUK,KOZHIKODE DISTRICT.

3. R.M.SHAHINA,AGED 27 YEARS,
   D/O. P.P.MOOSA, PARTNER, MAS TRADERS,
   RESIDING AT KATCHERI AMSOM AND DESOM
   OF KOZHIKODE TALUK,KOZHIKODE DISTRICT.

BY ADV. SRI.C.P.MOHAMMED NIAS

RESPONDENTS: DECREE HOLDERS & JUDGMENT DEBTORS

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1. THOPPIL PUTHIYA VETTIL
   KARANAVASTREE SHELIK ALEEMA ALIAS,KUNHIBI,
   D/O. BAPPAN KOYA HAJI,AGE NOT KNOWN TO THE
   APPELLANTS, RESIDING AT THOPPIL PUTHIYAVEETTIL
   HOUSE, IN NAGARAM AMSOM AND DESOM OF KOZHIKODE
   TALUK, KOZHIKODE DISTRICT.

2. THOPPIL PUTHIYAVVEETIL ABDULLA KOYA,
   AGE AND FATHERS NAME NOT KNOWN,

RESIDING AT NAGARAM AMSOM DESOM OF KOZHIKODE TALUK KOZHIKODE DISTRICT.

3. PUTHIYAPONMANICHINTAKATH AYISSABI, AGED AND FATHER'S NAME NOT KNOWN, RESIDING AT NAGARAM AMSOM, DESOM OF KOZHIKODE TALUK, KOZHIKODE DISTRICT.

4. PUTHIYA PONMANICHINTAKATH P.P.HAMSA KOYA (DIED).

5. PUTHIYA OJINTAKAM AMBOOBACKER KOYA P.O. AGED 52 YEARS, KASABA AMSOM, DESOM,KOZHIKODE TALUK

6. P.O. IMBICHAMINABI, W/O. P.O. HAMSA KOYA, ASHA MANZIL, CHALAPPURAM, KASABA AMSOM AND DESOM OF KOZHIKODE TALUK.

7. P.O. AYISHABI, W/O.K.HASSAN KOYA, "SHAHIR", CHALAPPURAM, KASABA AMSOM AND DESOM, KOZHIKODE TALUK.

8. P.O. SAINABI, W/O. AHAMMED BARAMY, "EMMC", PANNIYANKARA AMSOM AND DESOM, KOZHIKODE TALUK.

9. P.O. SUHARABI, FASNI HOUSE, FRANCIS ROAD, KOZHIKODE.

10. P.O. SAFIYA, W/O. ABDUL SAMMED, "SHANA MANZIL", CHALAPPURAM, KOZHIKODE.

11. P.O. SAKEER, P.A. HOUSE, PANNIYANKARA AMSOM AND DESOM, KOZHIKODE TALUK.

12. THOPPIL ABDULKHADER, S/O. BHAPPAN KOYA HAJI, PANNIYANKARA AMSOM AND DESOM OF KOZHIKODE TALUK.

BY ADV. SRI.K.M.FIROZ(CAVEATORS)

THIS EXECUTION SECOND APPEAL HAVING COME UP FOR ADMISSION ON 16/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.1441/2007 IN EX.SA.8/2007

16.8.07 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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Dated this the 16th day of August, 2007

JUDGMENT

Learned counsel appearing for the appellants and respondents were heard. The following substantial questions of law were formulated.

1) Whether the executing court was justified in dismissing the claim petition without affording opportunity to the appellants to prove the case, when the order passed under Rule 100, shall have the same force of a decree and under Rule 101 of Order XX1 all questions arising between the parties are to be determined in that proceeding and not by a separate suit.

2) Whether courts below were justified in holding that the lease was granted without the consent of the mortgagor?

2. After formulating the substantial questions of law, learned counsel appearing for respondents 1 and 2, who were the contesting respondents,

submitted that as the suit is that of 1966 if it is to be found that sufficient opportunity was not granted to the appellant to adduce evidence and opportunity should have been granted, appeal may be disposed directing the executing court to dispose the application after recording the evidence as expeditiously as possible.

3. The order in E.A.486/1999 in E.P.241/1997 which is challenged in this appeal shows that the application was disposed as not maintainable without affording opportunity to the appellants to adduce evidence. The decree sought to be executed is a decree for redemption of the mortgage as confirmed by the appellate court on 16.12.1972 in O.S.980/1966. Appellants are claiming that they are lessees under the mortgagee, but the lease was granted with the consent and knowledge of the mortgagor. That case was not accepted by the courts below and the petition was dismissed as not maintainable. The question is whether the

executing court was justified in disposing the application without granting an opportunity to the appellants to prove the case that the lease was granted with the concurrence of the mortgagor.

4. The petition was filed under Rule 97 of Order XX1 of the Code of Civil Procedure contending that appellants are tenants of the building and in execution of the mortgage decree they cannot be evicted. Under Rule 101, in such a proceeding all questions arising between the parties to the proceeding and relevant to the adjudication , shall be determined in that proceeding itself and not by a separate suit. Rule 103 mandates that an order on such adjudication shall be treated as a decree. An appeal is provided against such an order, like any decree. In such circumstances the executing court was not justified in dismissing the application as not maintainable, without affording an opportunity to the appellants to prove the case that though the lease was granted by the mortgagee,

it was with the concurrence and consent of the landlord.

5. The decision of the Apex Court in **All India Film Corporation Ltd v. Sri.Rajagyan Nath and others (1969 (3) SCC 79) was** cited before the trial court as well as the first appellate court. But it cannot be said that in all cases, a lease which came into existence when the mortgage was subsisting will stand terminated on redemption. True, a mortgagee's interest lasts only as long as the mortgage has not been paid off and on redemption of the mortgage, the title of the mortgageee comes to an end and a derivative title from him must ordinarily come to an end with the termination of mortgagee's title. Their Lordships enumerated the legal position as follows:-

> "The mortgagee by creating a tenancy becomes the lessor of the property but his interest

as lessor is co-terminous with his mortgagee interest. Section 111(c)of the Transfer of Property Act provides that a lease of immovable property detrmines where the interest of the lessor in the property terminates on, or his power to dispose of the same, extends only to the happening of any event-by the happening of such event. The duration of the mortgagee's interest determines his position as the lessor. The relationship of lessor and lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a fresh

> relationship is recreated. This the mortgagor or the person succeeding to the mortgagor's interest may elect to do. But if he does not, the lessee cannot claim any rights beyond the term of his original lessor's interest. These propositions are well-understood and find support in two rulings of this Court in Mahabir Gope and Others v. Harbans Narain Singh and Asaram and Others v. Mst.Ram Kali."

6. Hence even if a lease was created by a mortgagee, if the relationship is agreed to by the mortgagor or a fresh relationship is created redemption may not be terminated. The question whether lease was created with the consent or

concurrence is therefore relevant. True the claim petition does not disclose when the consent was granted or whether the consent ws granted orally or evidenced by any document. Even then executing court was not justified in dismissing the application as not maintainable, without granting an opportunity to the appellants to adduce evidence with regard to their case that the lease was granted with the consent of the mortgagor. If so the order is not sustainable.

7. Appeal is allowed. The order passed by executing court in E.A.486/1999 and the judgment in A.S.115/01 confirming the same are set aside. E.A.486/99 is remitted back to Munsiff, Kozhikode for fresh disposal in accordance with law. Executing court shall grant opportunity to the parties to adduce evidence and dispose the claim petition as expeditiously as possible, and in any event within four months from the date of appearance of the parties. Parties are directed to

appear before the executing court on 6.9.07.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006